RECORD AND BRIEFS

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

STATE FARM FIRE AND CASUALTY COMPANY,

Petitioner,

v.

UNITED STATES OF AMERICA, EX REL.
CORI RIGSBY; KERRI RIGSBY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement for Petitioner State Farm Fire and Casualty Company was set forth on page iii of its petition for a writ of certiorari, and there are no amendments to that statement.

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INTRODUCTION

State Farm respectfully submits this brief in response to the Brief of the United States as Amicus Curiae ("U.S.Br.").

Five years ago, the government told this Court that the split between the Sixth and Ninth Circuits regarding the consequences of an FCA seal violation "warrants resolution by this Court."[1] The government has now reversed its position, asserting that review by this Court is unnecessary because the circuit split may resolve itself at some unknown point in the future if the Sixth Circuit takes up the issue en banc and adopts the Ninth Circuit's view. (U.S.Br.15-16.)

This is not a cogent reason for allowing the current three-way circuit conflict to continue. Contrary to the government's contentions, the circuit conflict has deepened in the past five years. The split is *not* a two-sided split with the Ninth, Fifth, Second and Fourth Circuits on one side and the Sixth Circuit on the other, as the government contends. Rather, as the Fifth Circuit acknowledged, "three circuits have addressed the consequences of an FCA seal violation and come to divergent conclusions." (Pet.App.19a.) The Fourth Circuit has now followed the Second Circuit's standard, while explicitly rejecting the Ninth and Fifth Circuits' "no harm, no foul" rule. This multi-circuit divergence regarding the consequences of an FCA seal

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[1] Br. for United States as Amicus Curiae at 7, *United States ex rel. Summers v. LHC Grp.*, No. 10-827 (U.S. May 2011). The government recommended against certiorari in *Summers* for reasons not relevant here. (Pet.3 n.2.)

violation warrants resolution by this Court. The conflict between the Fifth Circuit's decision and this Court's precedents gives additional urgency to the need for review by this Court.

The Petition also presents a significant conflict regarding the FCA's standard for corporate scienter. In *Staub v. Proctor Hospital*, 562 U.S. 411, 418 (2011), this Court noted the conflict between the Fourth and D.C. Circuits as to whether the mental states and actions of two employees could be aggregated to show scienter on the part of an employer. (Pet.29-30.) That split has now been widened by the expansive and erroneous theories of scienter applied by the Fifth Circuit in this case. The Fifth Circuit held that scienter was satisfied by aggregating (i) the collective bad intent of one group of employees to engage in a generalized fraudulent scheme with (ii) another employee's independent, good-faith decision, after a full review of all available information, to submit the "false claim." The Fifth Circuit reached this conclusion without requiring a causal connection between the generalized scheme and the submission of the false claim. Whether corporate scienter can be established under the FCA on this basis is not a question of fact, as the government contends, but a question of law as to the legal standard governing corporate scienter under the FCA.

For the reasons stated herein and in the Petition and Reply, certiorari should be granted on both questions presented.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS REGARDING THE FCA SEAL REQUIREMENT

A. The Government Incorrectly Minimizes the Acknowledged Three-Way Circuit Conflict

The Fifth Circuit acknowledged in this case that a three-way split exists among the circuits on the consequences of a violation of the statutory seal. (Pet.App.19a-20a.) The government erroneously minimizes the significance of these conflicts.

First, the government attempts to portray the Fifth, Ninth, Second and Fourth Circuits as being in agreement, with the Sixth Circuit as the only "outlier." (U.S.Br.7.) The Fourth Circuit recently made clear that this is not so, flatly rejecting the Fifth and Ninth Circuits' "no harm, no foul" balancing test and following the Second Circuit's frustration-of-government-purposes standard instead. *Smith v. Clark/Smoot/Russell*, 796 F.3d 424, 430 (4th Cir. 2015). Under the Second and Fourth Circuits' standard, possible harm to the government is sufficient to warrant dismissal with prejudice for a seal violation, whereas the Fifth and Ninth Circuits expressly require actual harm to the government. (Pet.15-16,18; ReplyBr.3-4.) The government's assertion (U.S.Br.14) that in *United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995 (2d Cir. 1995), the Second Circuit found actual harm to the government, not merely a *possibility* of harm, is incorrect. *See id.* at 999 (because government "was not notified that a *qui tam* complaint had been filed," it "could not determine

whether the complaint *might* interfere with any ongoing investigation .... Any settlement value that *might* have arisen from the complaint's sealed status was eliminated." (emphasis added)).

These conflicts are deepened by the Circuits' disagreement as to whether protection of a defendant's reputation is a relevant consideration when scrutinizing a seal violation, as the Second and Fourth Circuits hold. The Fifth and Ninth Circuits hold to the contrary. (Pet.18-19; ReplyBr.4-5.) The government incorrectly contends that harm to reputation is not an issue in this case. (U.S.Br.14,n.6.) Relators' repeated intentional violations of the seal resulted in an avalanche of unfavorable publicity that was undeniably damaging to Petitioner's reputation (Pet.9-11; Pet.App.21a) and would be a relevant factor under the Second and Fourth Circuits' rule.

The government asserts that there is no need for this Court to resolve these conflicts because the Sixth Circuit might at some indefinite time in the future "revisit the issue en banc and eliminate the circuit split." (U.S.Br.7.) That is pure speculation. Moreover, even if the Sixth Circuit were to revisit the issue, it might well re-affirm its decision in *United States ex rel. Summers v. LHC* Group, 623 F.3d 287 (6th Cir. 2010), given the logic of that decision and the long line of precedents from this Court holding that dismissal is required for noncompliance with statutory procedural requirements that are prerequisites to suit. (Point I.B *infra*; Pet.19-25; ReplyBr.6-8.)

The government also suggests that, because the Relators' violations of the seal occurred after the

district court granted the government an extension of the seal period, the sanction for those violations should be up to the court's discretion. (U.S.Br.16.) The government speculates that the Sixth Circuit would not apply the *Summers* rule to post-extension violations. (*Id.*) The government provides no principled basis for distinguishing between seal violations during the initial seal period of at least 60 days and those during an extension of the seal period. Nothing in the statutory language indicates that the mandatory character of the seal is altered when the seal period is extended. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44-45 (1991), and other cases cited by the government (U.S.Br.10-11) that address the courts' inherent power to fashion an appropriate sanction for violation of a court-imposed, non-statutory seal or other litigation misconduct are irrelevant to the question whether a court has discretion to fashion lesser sanctions than dismissal for an FCA seal violation.

Moreover, *Summers* itself does not support the government's notion that the Sixth Circuit might distinguish between violations in the initial seal period and violations after an extension (such as those at issue here). In *Summers*, 623 F.3d at 295-96, the Sixth Circuit rejected any distinction between a failure to file under seal and an after-filing seal violation. The Sixth Circuit also pointed to the statutory provision for extensions of the seal period on motion by the government as demonstrating Congress's intent *not* to distinguish between filing violations and after-filing violations. *Id.* at 297. The Sixth Circuit reasoned that, had Congress intended to allow relators to obtain *abbreviations* of the seal period, it could have so

provided. *Id.* The Sixth Circuit explained that the provision for extending the seal period, and the lack of any provision for shortening it at the request of a relator, indicated Congress's intent that the relators must maintain the seal throughout the seal period. *Id.* This explicit reasoning forecloses the government's suggestion that the Sixth Circuit might apply a different rule to post-extension seal violations.

The issue of the consequences for an FCA seal violation presents genuine conflicts among the Circuits on an important and recurring question of federal law. This Court should grant certiorari to resolve these conflicts and establish a uniform rule for FCA seal violations.

B. The Fifth and Ninth Circuits' Balancing Test Conflicts with This Court's Jurisprudence on Statutory Prerequisites to Suit.

The government erroneously argues that certiorari should be denied because the balancing test adopted by the Fifth and Ninth Circuits is correct. (U.S.Br.7-8.) This argument ignores key points concerning the statutory language, the legislative history, and the relevant decisions of this Court.

The government attempts to distinguish *Hallstrom v. Tillamook County*, 493 U.S. 20 (1989), based on the statutory language "[n]o action may be commenced" without the requisite 60-day notice to the government. (U.S.Br.9.) The FCA's legislative history indicates, however, that Congress viewed the seal requirement as closely analogous to 60-day statutory notice

provisions such as that addressed in *Hallstrom*. *See* S. Rep. No. 345, 99th Cong. 2nd Sess. 1986, 1986 U.S.C.C.A.N. 5266, 5289 ("The initial 60-day sealing of the allegations has the same effect as if the *qui tam* relator had brought his information to the Government and notified the Government of his intent to sue."). Like 60-day notice provisions, the FCA's 60-day seal requirement is designed to give the government time to investigate and decide how to proceed. *See id.*; *cf. Hallstrom*, 493 U.S. at 29 (60-day "notice allows government agencies to take responsibility for enforcing environmental regulations").

The difference in formulation between 60-day notice provisions and the FCA's 60-day seal requirement is not intended to make one a mandatory precondition to suit and the other not. Rather, the difference springs from Congress's desire to prevent private FCA suits from interfering with sensitive government investigations. S. Rep. No. 345, 1986 U.S.C.C.A.N. at 5289. The mechanism chosen, a 60-day seal with extensions, necessitated the involvement of the courts. The use of this mechanism, instead of a 60-day delay, does not change the mandatory nature of the seal requirement or its essential similarity to 60-day notice provisions.

The government stresses that an FCA seal violation "does not strip the court of subject-matter jurisdiction over the suit." (U.S.Br.8.) While this may be true, it is irrelevant. This Court held in *Hallstrom* that 60-day notice and delay provisions "are mandatory conditions precedent to commencing suit under the RCRA citizen suit provision" and that "a district court may not disregard these requirements at

its discretion." 493 U.S. at 31. To reach that conclusion, it was not necessary for this Court to determine "whether the notice provision [wa]s jurisdictional or procedural." *Id.*

The government (U.S.Br.10) also improperly relies upon *Scarborough v. Principi*, 541 U.S. 401 (2004). That decision held that relation back permitted the postjudgment amendment of a fee application under the Equal Access to Justice Act to include the statutorily required allegation that the government's position in the underlying litigation was not substantially justified. The Court noted that the issue "presents a question of time" and "relates only to postjudgment proceedings auxiliary to cases already within that court's adjudicatory authority." *Id.* at 413-14. *Scarborough* follows established principles in permitting relation back and is consistent with this Court's approach to statutory "time-related directive[s]." (ReplyBr.5-6.) Like a 60-day notice provision, the FCA's 60-day seal requirement is *not* a deadline or timing provision that "operate[s] as a statute of limitations" and is subject to equitable modification. *See Hallstrom*, 493 U.S. at 27. Rather, it is a Congressionally-mandated precondition to pursuing a right of action created by statute that must be strictly enforced. *Id.*; Pet.22-25.

In sum, the Fifth and Ninth Circuit's use of a balancing test to determine the consequences of an FCA seal violation conflicts with this Court's jurisprudence on the enforcement of statutory prerequisites to suit. That conflict merits review by this Court.

II. CERTIORARI IS WARRANTED TO ESTABLISH A UNIFORM INTERPRETATION OF THE FCA'S SCIENTER REQUIREMENT

The government seeks to avoid review of its erroneous and expansive theory of collective scienter that "it is sometimes appropriate to hold a corporate FCA defendant liable even though no single employee acted with the scienter that the [FCA] requires." (U.S.Br.22n.7.) Contrary to the government's contentions (*id.*21-22), that is precisely what the Fifth Circuit did in this case, and its ruling exacerbates the conflict that this Court has noted between the D.C. and Fourth Circuits. *See Staub*, 562 U.S. at 418 (citing *United States v. Science Applications Int'l Corp.*, 626 F.3d 1257 (D.C. Cir. 2010) ("*SAIC*"), and *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908 (4th Cir. 2003)).

The D.C. Circuit in *SAIC* required that an individual or individuals must "kn[o]w or recklessly fail[] to know" both (i) the underlying facts that render a claim false (in *SAIC*, the facts of the "company's business relationships") and (ii) the facts concerning the submission of the false claim (the employer's "organizational conflict of interest obligations to the NRC"). *SAIC*, 626 F.3d at 1276. This legal principle, applied to the false claim at issue here, would require that an individual or individuals knew (or recklessly disregarded) both the underlying facts (that the McIntosh house was destroyed by wind) *and* that a false flood claim was presented. That legal requirement was not satisfied (Pet.31-35), and the

application of the *SAIC* rule would require reversal in this case.

The Fourth Circuit in *Harrison* rejected the "view that a single employee must know both the wrongful conduct and the certification requirement." *Harrison*, 352 F.3d at 919. However, the Fourth Circuit at least required that a single employee have knowledge of the relevant underlying facts. *Id.* at 918-19. The Fifth Circuit dispensed with that requirement. Instead, the Fifth Circuit relied on the collective intent of a group of employees to "perpetrate" a generalized, fraudulent scheme to submit false flood claims, without examining what, if anything, the "perpetrators" knew regarding the specific claim at issue and what connection, if any, there was between the generalized scheme and the false claim at issue. (Pet.31-32,34.)

The government asserts that no such inquiry was necessary because scienter does not require that any individual employee of Petitioner had knowledge of the "specific false claim" regarding the McIntosh house and because "the court found sufficient evidence to conclude that [Lecky] King knew in advance that the fraudulent scheme she had orchestrated would cause false claims to be submitted." (U.S.Br.20-21.) However, the trial of this case involved only the McIntosh claim. The government's contention that Relators did not need to show scienter specifically as to the only claim at issue effectively jettisons scienter altogether and is directly contrary to the statute, which imposes liability only when a defendant "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval." 31 U.S.C. §3729(a)(1)(A). The statute requires scienter

as to the McIntosh claim and is not satisfied by a purported general fraudulent scheme. (Pet.33.)

The government recently argued to this Court that "the FCA's scienter and materiality requirements ... protect claimants" from unwarranted liability under the FCA. (Br. for United States as Amicus Curiae at 10, *Universal Health Servs., Inc. v. United States ex rel. Escobar*, No. 15-7 (U.S. Mar. 2016)). The principles of law urged here by the government would eviscerate that protection and extend liability far beyond the "'knowing presentation of what is known to be false'" that the FCA requires. *Mikes v. Straus*, 274 F.3d 687, 703 (2d Cir. 2001)(citation omitted). The government's analysis, like the Fifth Circuit's, simply glosses over the Fifth Circuit's failure to require any evidence connecting the "fraudulent scheme" to the "false claim" for which State Farm has been held liable. This analytical failure is at the heart of the legal issue presented in the Petition.

Most courts, including the D.C. Circuit (*SAIC*, 626 F.3d at 1276), have recognized an exception to the bar on collective knowledge when a corporation has deliberately compartmentalized its structure to prevent certifying employees from learning facts that would render a claim false, as such compartmentalization constitutes deliberate ignorance of the facts. But, contrary to the government's suggestion, "compartmentalization" was not at issue here. There was no contention that John Conser, "the State Farm supervisor and team leader who ultimately made the decision to pay the McIntosh flood claim" (Pet.App.37a), was prevented from learning facts pertaining to the proper adjustment of the McIntosh

property or that any such facts were withheld from him. Similarly, the government is wrong that "innocent certifier" cases permit liability here. (U.S.Br.18-19.) Contrary to the government's contentions (*id.*), the fact that Conser was "unaware" of the purported fraudulent scheme underscores the absence of scienter and the lack of any connection between the scheme and his independent, informed decision to submit the McIntosh claim. There was *no* evidence that Conser (or anyone else) knew or should have known that the McIntosh house was "wracked" by wind and "completely destroyed" by hidden structural damage before it was flooded, a theory Relators' expert later developed for trial. (Pet.14.)

The government (U.S.Br.22) also seizes upon the Fifth Circuit's alternate holding that "King alone, 'act[ing] in reckless disregard of the truth or falsity' of the information, 1) caused a false claim to be presented for payment, and 2) caused a false record material to a false claim to be made or used." (Pet.App.39a.) The Fifth Circuit's conclusory recitation of the statutory language does not eliminate the problem of aggregating the unrelated mental state of one employee (King) with the actions of another (Conser). Under the undisputed facts, the viability of the Fifth Circuit's holding that King "caused" Conser's submission of McIntosh claim still depends, as a legal matter, on the fiction of collective knowledge, that is, on combining Conser's independent, good-faith and informed decision to pay the McIntosh claim as flood damage with King's purported malicious intent to "cause" him (in some unexplained way) to do so. Moreover, the sole support given by the Fifth Circuit for its holding is King's unspecified "post-payment"

knowledge of the claim. (Pet.App.38a-39a,n.15). The Fifth Circuit's reliance on after-the-fact knowledge directly conflicts with the rule of other circuits that after-the-fact knowledge cannot support scienter under the FCA. (Pet.35-36.)

The legal standard for scienter is a central issue in FCA litigation and urgently requires resolution by this Court.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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